



Appeal Decision

Site visit made on 12 October 2021

by Richard S Jones BA (Hons), BTP, MRTPI

an Inspector appointed by the Secretary of State

Decision date: 25 November 2021

Appeal Ref: APP/H5390/C/20/3263620

Land at 308 - 310 North End Road, London, SW6 1NQ

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
 - The appeal is made by Mr Nordine Belkharoubi (Afrik Fulham Limited) against an enforcement notice issued by the Council of the London Borough of Hammersmith & Fulham.
 - The enforcement notice, numbered 2019/01233/COMPWK, was issued on 12 October 2020.
 - The breach of planning control as alleged in the notice is the installation of three A/C units and extraction flue to the flank northern elevation, at second floor level.
 - The requirements of the notice are:
 - Remove the three A/C units associated fixings from the flank northern wall as shown in the photo attached within this notice
 - Remove the extraction flue and associated fixings from the flank northern wall, as shown in the photo attached within this notice.
 - The period for compliance with the requirements is four months.
 - The appeal is proceeding on the grounds set out in section 174(2)(c), (f) and (g) of the Town and Country Planning Act 1990 as amended.
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Decision

1. It is directed that the enforcement notice is corrected and varied by:
 - inserting the word 'and' between the words 'units' and 'associated' in the first paragraph of section 4; and
 - the deletion of four months and the substitution of nine months as the time for compliance.
2. Subject to the correction and variation, the appeal is dismissed and the enforcement notice is upheld.

Preliminary Matters

3. I sympathise with the appellant about the ongoing effects of the COVID-19 pandemic on his business. I also sympathise that due to a family bereavement the appellant was unable to action the invalidity issues associated with his planning application made in September 2020 for the installation of two air conditioning units¹.
4. I have also noted the representation from the neighbouring occupants regarding the effects of the air conditioning (A/C) units, as well as the appellant's comments on the same.

¹ Planning Application Ref: 2020/02408/FUL

5. However, save that personal circumstances may be relevant to ground (g), I am not otherwise able to consider matters relating to personal circumstances or the planning merits, because the appellant has not made an appeal on ground (a), which is that planning permission should be granted for what is alleged in the notice.

The Appeal on Ground (c)

6. A ground (c) appeal is that the matters alleged in the notice do not constitute a breach of planning control. The ground (c) appeal is made in respect of the extraction flue only and does not include the alleged A/C units. The onus lies with the appellant to make his case on the balance of probabilities.
7. Planning permission was granted on appeal in 2016² for the residential use of the upper floors of the appeal premises together with alterations and extensions. Pursuant to Condition 4 of that permission, extract flue details were approved by the Council in December 2017³. The approved drawings⁴ show the extract flue protruding from the rear roof pitch of the property and extending to just above ridge height.
8. However, the alleged flue runs up the outside of a rear wall and terminates below eaves level. Moreover, it is positioned in a narrow, recessed space between the appeal site and the neighbouring property, which doesn't appear to be shown on the approved drawings. Although the annotation on the drawings refer to external wall mounted ducting and vent colour black⁵, the former is the only aspect that can be attributed to the alleged extraction flue, which isn't black and appears to be unfinished galvanised steel.
9. I therefore find, on the balance of probability, that the alleged extraction flue does not comply with the details approved pursuant to Condition 4. Moreover, extending the height as suggested would not confirm full compliance with the approved details because other material differences would remain. Indeed, extending upwards from its current position would avoid having to pass through the roof in the manner shown on the approved plans.
10. In any case, s174(2)(c) of the 1990 Act (ground (C)) is worded in the present tense - that those matters do not constitute a breach of planning control. The appellant may therefore rely upon matters occurring since the date of issue of the enforcement notice, but not which may occur in the future.
11. I conclude that the appellant has not shown, to the required standard of proof, that the extraction flue already benefits from a grant of planning permission. The matters alleged in the notice constitute a breach of planning control and the appeal on ground (c) fails.

The Appeal on Ground (f)

12. An appeal on ground (f) is that the requirements of the enforcement notice are excessive to remedy the breach of planning control or, as the case may be, the injury to immunity caused by the breach. The appellant's case under ground (f) is again restricted to the alleged extraction flue.

² Appeal Ref: APP/H5390/W/15/3136530

³ Application Ref: 2017/04237/DET

⁴ Elevation 01, 02, 03 – Extraction Placement

⁵ 'Restaurant kitchen external wall mounted ducting and vent colour black'

13. The requirements of the notice are, in short, to remove the alleged A/C units and extraction flue along with their respective fixings. The purpose of the enforcement notice is therefore to remedy the breach.
14. The appellant's view is that the requirement to remove the flue is unwarranted and should be removed from the notice. However, such an argument relates, at least in part, to the merits of the alleged development and not the requirements of the notice. Since the appellant has chosen not to pursue an appeal on ground (a), for consideration of the deemed planning application, I cannot consider the merits of the alleged use under ground (f). Indeed, given the absence of a ground (a) appeal and the purpose of the notice, any lesser step that would not remedy the breach cannot be accepted through a ground (f) appeal.
15. The appellant further states that *'should the reduced height of the flue as installed be a concern in terms of amenity, then a reasonable remedy would be to require the flue to be completed to the full height shown in the approved drawings under approval ref 2017/04237/DET.'* As noted, the purpose of the notice is to remedy the breach, rather injury to amenity caused by the breach. Moreover, I have found, under ground (c), that the alleged extraction flue does not comply with the details approved under application reference 2017/04273/DET. Extending its height would not change that position for the reasons explained.
16. In order to remedy the breach, the requirement could be varied so that the extraction flue is completed in accordance with the approved details. Again, having regard to my findings under ground (c), that would involve removing the existing flue anyway and replacing it with one which would be largely internal, and exiting the property at roof level. Based on the appellant's submissions, that is clearly not what is sought under ground (f). Therefore, to vary the notice in those terms would result in requirements that are more onerous. Consequently, such a variation could not be made without causing injustice to the appellant.
17. Nevertheless, I note that the first requirement is to *'Remove the three A/C units associated fixings...'*. That requirement is clearly missing the word 'and' between the words 'units associated'. I am satisfied that I am able to exercise my powers under s176(1)(a) of the 1990 Act to correct that omission, so as to put the notice in order and to be consistent with the wording of the second requirement, without causing injustice to either party. On that basis I find that the requirements of the notice tally with the allegation and are not excessive but necessary to remedy the breach. The appeal on ground (f) fails.

The Appeal on Ground (g)

18. The ground (g) appeal is that the four months given to comply with the notice is too short.
19. I recognise the effects and the difficulties presented by the COVID-19 pandemic to businesses within the hospitality sector. I also accept the need and importance of the flue and A/C units to the continued operation of the appellant's restaurant business and that within that context, the appellant will wish to explore the possibilities of alternative plant and/or locations. That will likely involve procuring the services of an acoustic engineer as well as preparing a planning application with the appropriate technical assessments.

Sufficient time should also be provided to determine the application and obtain any other required permissions, including that of the freeholder. Time will also be reasonably required to procure specialist services to replace or relocate the plant.

20. I therefore agree that the period of four months is too short and that the period for compliance should be extended to nine months. That would strike a reasonable and proportionate balance between any difficulties the appellant may encounter and the public interest in this case.
21. I shall therefore vary the enforcement notice accordingly prior to upholding it. The appeal on ground (g) succeeds to that extent.

Richard S Jones

INSPECTOR